IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1807

THE STUART MCGUIRE COMPANY, INC.,
Appellant,

v.

WILLIAM H. FORST, State Tax Commissioner,
FRANK W. LEWIS, Director, Sales and Use Tax Division, and,
VIRGINIA DEPARTMENT OF TAXATION,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Appellant, pursuant to Part IV of the Rules of United States Supreme Court, files this, its statement of the basis upon which it contends that the Supreme Court of the United States has jurisdiction on an appeal to review a final decision of the Supreme Court of Virginia and that the Supreme Court of the United States should exercise such jurisdiction in this case.

OPINION BELOW

The opinion of the Supreme Court of Virginia denying Appellant's petition for appeal and affirming the order of the Circuit Court of the City of Richmond is not reported. That opinion and the opinion and order of the Circuit Court of the City of Richmond are set forth in the Appendix filed with this Statement.

JURISDICTION

I

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) in that the Appellant, by a suit for an injunction, has drawn in question the validity of Virginia's statutory scheme for the collection of taxes on the ground that those statutes are repugnant to the Constitution of the United States, and the decision of the Supreme Court of Virginia was in favor of their validity.

II

The order of the Supreme Court of Virginia was entered on March 16, 1976. The Notice of Appeal was filed on May 12, 1976, in the Supreme Court of Virginia. A copy of said notice is set forth in the Appendix.

III

Jurisdiction of this Court is sustained under the doctrines enunciated in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), its progeny and *Commissioner* v. *Shapiro*, _____ U.S. _____ (No. 74-744), 44 U.S.L.W.4313 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the applicability of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States to Virginia's statutory scheme for the collection of use taxes without benefit of a judicial hearing in a non-jeopardy situation. In particular, this case calls into question the constitutionality of VA. CODE ANN. §58-1010, (Repl. Vol. 8A, 1974, page 440), the relevant portion of which reads as follows:

> §58-1010. COLLECTION OUT OF ESTATE IN HANDS OF OR DEBTS DUE BY THIRD PARTY. — Any person indebted to or having in his hands estate of a person assessed with taxes or levies may be applied to in writing by the officer for payment thereof out of such debt or estate and a payment by such person of such taxes or levies, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. From the time of the service by such officer of any such application, the taxes and levies shall constitute a lien on the debt so due from such person or on the estate in his hands.

Other pertinent statutes in Virginia's method of collecting allegedly due use taxes (i.e. VA. CODE ANN. §§58-441.32, 58-1118, 58-1119, 58-1130 and 58-1158) are set forth in the Appendix.

QUESTION PRESENTED

This case involves the power of the Commonwealth of Virginia, once having unilaterally stated that a tax is due from a corporation, to proceed to seize that business' working capital contained in its bank accounts in satisfaction of the alleged tax, all without an impartial determination of liability for the tax

and under circumstances where it is conceded that a jeopardy assessment is not warranted. The question presented is:

Whether Virginia's statutory scheme for the collection (not assessement) of allegedly due taxes, and in particular VA. CODE ANN. §58-1010, which allows levy upon and seizure of a bank account in the absence of a judicial hearing and in a non-jeopardy situation, violates the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Events Prior to Litigation

On May 21, 1974, an Appellee, The Virginia Department of Taxation (hereinafter "The Department") assessed the Appellant with Virginia sales and use taxes in the amount of approximately $200,000.00. The taxes assessed represented sales and use taxes allegedly due from December 1, 1969, to July 1, 1973, under VA. CODE ANN. §58-441.1, et seq. (Repl. Vol. 1974) (hereinafter "CODE"). This appeal is not concerned with the validity of the assessment. The assessment was done by and through the auspices of the Appellees William H. Forst (hereinafter referred to as "Commissioner") and Frank W. Lewis, (hereinafter referred to as "Director"). The Commissioner is the State Tax Commissioner, Virginia Department of Taxation, and as such, he supervises and has direct responsibility for the assessment and collection of taxes by the Department. The Director is the Director of the Sales and Use Tax Division of the Virginia Department of Taxation, and, as such, he has responsibility for the assessment and collection of sales and use taxes under the Commissioner within the Department. The Department is that administrative agency of the Commonwealth of Virginia charged with the statutory duties of assessing and collecting tax revenues lawfully determined to be due the Commonwealth of Virginia.

Both before and after receiving the formal assessment, the Appellant had denied its liability for the sales and use taxes in numerous conferences with, and letters to, the Director. In addition, the Appellant timely applied to the Commissioner for relief from the assessment pursuant to CODE §58-1118. However, on September 18, 1974, the Commissioner denied the relief sought.

The Appellant, both before and after the application to the Commissioner for relief from the assessment, had informed the Appellees that it would apply to the proper court within Virginia, pursuant to CODE §58-1130, for relief from the assessment on the grounds that the assessment was wrongful. However, even knowing this, and before the Appellant could apply to the proper Virginia court, the Appellees, without any prior notification to the Appellant and without benefit of any judicial process whatsoever, did, on October 18, 1974, serve notice of liens on the Farmers National Bank of Salem, Virginia, and the First and Merchants National Bank, Richmond, Virginia, and froze the bank accounts of the Appellant under the "authority" of CODE §58-1010. These bank accounts contained the Appellant's working capital for the day-to-day operation of its nationwide catalog mail-order business.

Because of the dire emergency created by the freezing of its working capital, the Appellant immediately contacted the Appellees. Negotiations began and, even though CODE §58-1010 contains no "release of assets upon posting bond" procedure, the Appellees required the Appellant to post a bond with corporate surety thereon in the sum of $250,000.00, conditioned upon full payment of the alleged taxes should they ultimately be judicially determined to have been properly assessed. Upon the giving of the bond, the Appellees released the Appellant's working capital. The bond posted by the Appellant has an annual premium charge of $3,750.00 and it is still in effect.

The Litigation

The Appellant, in November, 1974, filed its Bill for Injunction in the Circuit Court for the City of Salem against the Appellees, seeking a mandatory injunction to allow the cancelling of the aforesaid surety bond, to enjoin the Appellees from attempting to collect the assessed taxes until the correctness of that assessment is determined by proper judicial authority and for the award of compensatory damages. An Amended Bill for Injunction was later filed, seeking the same relief as in the original Bill with the exception of compensatory damages, which prayer was dropped. Under Virginia procedure that is not now contested, the case was transferred to the Circuit Court for the City of Richmond.

Both the original Bill and the Amended Bill sought the injunction upon two essentially separate grounds set forth in those pleadings—first, that the Virginia tax collection laws themselves did not allow the use of CODE §58-1010 in this factual situation, and, secondly, that if Virginia law did allow the freezing of the account, the law so allowing the freezing of the account was violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Appellees filed their Demurrer to the Amended Bill, alleging that CODE §58-1158 (Virginia's tax anti-injunction statute which, as a mere codification of traditional equitable principles, purports to preclude the maintenance of any suit to restrain the assessment or collection of any tax except where the party has no adequate remedy at law) divests the Circuit Court of the City of Richmond of jurisdiction because CODE §58-1130 (the statute which allows a suit for the correction of an erroneous assessment) is an adequate remedy at law. Under Virginia law, a demurrer admits all factual allegations pleaded by the Plaintiff. Additionally, the Appellees specifically conceded that the collection of the tax would not be jeopardized by delay, and that this was not a jeopardy situation. See *Defendant's Brief in Support of Demurrer* at 7-8, contained in the Appendix at A-12.

The arguments upon the Demurrer were made to the Circuit Court for the City of Richmond by written memoranda and by oral presentation. By opinion letter dated July 25, 1975, the Honorable Alex H. Sands, Jr., Judge, sustained the Appellees' Demurrer upon the grounds that Virginia's law allows the pre-determination collection of taxes, that such collection is not violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and that CODE §58-1130 is an adequate remedy at law. A final order sustaining the Demurrer and dismissing the suit was entered on August 27, 1975.

Thereafter, the Appellant duly and properly filed its Petition for Appeal to the Supreme Court of Virginia alleging the same grounds as in its Amended Bill for Injunction. After reviewing the record and petition, the Supreme Court of Virginia, by order dated March 16, 1976, found no reversible error upon state or federal grounds, rejected the petition, and refused the appeal, the effect of which was to affirm the dismissal of the suit.

The Notice of Appeal to the United States Supreme Court was thereupon duly filed. The Appellant does not now contest whether or not the laws of Virginia allowed the Appellees to seize the Appellant's bank accounts but does contest the validity of those laws under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

THE FEDERAL QUESTION IS SUBSTANTIAL

Unless There Be Some Valid, Overriding State Interest, the Seizure of the Appellant's Bank Accounts by the State of Virginia for Alleged Back Taxes Without Benefit of Judicial Intervention Violates the Due Process Clause of the Fourteenth Amendment.

A basic tenant of the due process requirement of the Fourteenth Amendment is that one not be deprived of his property by state action without the opportunity to be heard

and to defend his interests or, at the least, that the seizure of his property be initiated and supervised by an impartial or neutral officer. Furthermore it is abundantly clear that in order for governmental deprivation to meet minimal due process requirements, one must be given a *meaningful* opportunity to be heard. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971) and *Bell* v. *Burson*, 402 U.S. 535 (1971). The threshold questions of "state action" and "deprivation of property" are certainly present in the case at bar. It can not seriously be questioned that the seizure of large bank accounts by state agents, pursuant to a state statute, involves anything other than state action in the deprivation of property.

By means of the assessment against the Appellant, a debtor-creditor relationship arose between the Appellant and the Appellees. The Appellees allege by the assessment that the Appellant owes the Department money. The Appellees had no judgment but possessed merely a unilateral summary determination by them that the Appellant was in arrears. The Appellees then proceeded against the Appellant's bank accounts before it had an opportunity to be heard by an impartial or neutral officer. A series of cases from this Court, the last one of which was decided in January of 1975, have held that such action violates the Appellant's right to due process in a debtor-creditor relationship.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), this Court voided a Wisconsin prejudgment garnishment statute which permitted a creditor, without notice or a prior judicial hearing, to freeze the wages of an alleged debtor when the creditor had no prior interest in the wages. As this Court later noted in *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, at 614 (1974), it was not clear whether, under the Wisconsin statute, the debtor in *Sniadach* could immediately challenge the garnishment and obtain a prompt hearing to determine, at least preliminarily, its merits. Recognizing that a garnishment under the Wisconsin statute "may as a practical matter drive a wage-

earning family to the wall", this Court concluded that, because no extraordinary circumstances justified the scheme, "absent notice and a prior hearing . . .this prejudgment garnishment procedure violates the fundamental principles of due process." *Sniadach, supra*, 395 U.S. at 341-342.

Clearly, in the case at bar, there was no notice or prior hearing before the Appellees seized the bank accounts of the Appellant. In an *ipse dixit* fashion, the Appellees stated that the Appellant owed money and, thereupon, in a conceded non-jeopardy situation, seized the entire working capital of the Appellant pursuant to CODE §58-1010. There was no notice prior to seizure and no pre-seizure hearing. While it has been felt by some that *Sniadach* is limited solely to a specific type of property, to-wit: wages, there is demonstrably absolutely no difference between the wages of a family and the working capital of a corporation. Without the working capital, a corporation will wither and suffer economic death as surely as will a family whose wages have been garnished. It is further to be noted that a corporation pays wages to its employees from the working capital and, thus, a chain reaction sets in. Impound the working capital and employees will not receive *any* wages, an economic effect even more drastic than the garnishment procedure struck down in *Sniadach*.

The next logical step in the creditor-debtor prejudgment seizure situation was taken in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), which challenged the constitutionality of Florida and Pennsylvania prejudgment replevin statutes. Under the Florida law, the creditor, after replevin, was required to go to court and prove his case while under the Pennsylvania statute, the debtor, after replevin, was forced to take the initiative to begin legal proceedings for the return of the property. Each of these statutes authorized

> "the issuance of writs ordering state agents to seize a person's possessions, simply upon the *ex parte* application of any person who claims a right to them and posts

a security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure at any kind of prior hearing." *Id.* at 69-70.

In finding the two replevin statutes unconstitutional in *Fuentes,* this Court held that the Fourteenth Amendment's right to procedural due process requires, except in extraordinary situations, notice and opportunity for an adversary-type hearing before a person can be deprived, even temporarily, of any possessory interest in personalty. 407 U.S. at 86-87; *see Mitchell* v. *W. T. Grant Co., supra,* 416 U.S. at 623 (Powell, J., concurring).

The Appellees, however, would argue in the case at bar that the Appellant has its opportunity for a hearing through the "correction of erroneous assessment" procedure spelled out by CODE §58-1130, and that because the Appellees allowed the Appellant to post a bond to free its bank accounts (even though such a bonding procedure is not authorized by CODE §58-1010) there was no deprivation of property or, if there were, it was *de minimis.*

The creditor in *Fuentes* unsuccessfully advanced the same arguments. This Court specifically held that an *ex post facto* hearing is not sufficient:

> "If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken. . .But no later hearing. . .can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred . . .[A] temporary non-final deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." 407 U.S. at 81-82.

Thus, under the *Fuentes* doctrine, a hearing under CODE §58-1130 to attack the assessment after the "collection" had already occurred would not support the Appellees' action. A deprivation has been done and the damage will continue whether or not there is a later "remedy". Property was seized and would have remained seized had it not been for the bond.

But the allowance of a bond does not negate the underlying violation of procedural due process. *Fuentes* specifically held that allowing a bond to be posted was not sufficient for due process purposes:

> "Both *Sniadach* and *Bell* [v. *Burson, supra*] involved takings of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes included recovery provisions, allowing the defendants to post security to quickly regain the property taken from them. Yet the Court firmly held that there were deprivations of property that had to be preceded by a fair hearing." *Id.* at 85.

This Court made it quite clear that whatever result might be reached in a hearing on the merits of the creditors' claim, such as a determination of the correctness of the tax assessment in the case at bar, the ultimate result was completely immaterial to any constitutional claims involving the collection process before such determination:

> "But even assuming that the Appellants had fallen behind in their installment payments, and that they had no other valid defences, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. . . It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of the hearing. . ." 407 U.S. at 87.

Clearly, under the *Fuentes* doctrine, absent special circumstances, the Appellant was entitled to pre-seizure notice and a pre-seizure hearing before the Appellees could seize the Appellant's working capital. The Appellees' magnanimous allowance of the posting of a bond, even though not authorized by the statute, did not prevent the due process violation from having taken place.

The next chapter in the prejudgment seizure quartet was won by the creditors, but only because of: (1), the involvement of a judge from the very beginning of the procedure (i.e., an application for the prejudgment writ containing more than mere conclusory allegations was presented to a judge who, if satisfied, thereupon issued the *ex parte* writ of sequestration); (2), the requirement of a prompt post-seizure adversary hearing wherein the creditor possessed the burden of proof; (3), a relatively uncomplicated underlying matter that normally could be easily determined by documentary proof; and, (4), most importantly, the fact that the creditor, through his vendor's lien, had a present interest in the property along with the debtor. This Court, in *Mitchell* v. *W. T. Grant Co., supra,* 416 U.S. 600 (1974), applied a balancing test because of the creditor's interest in the property and held that the Louisiana sequestration procedure"... effects a constitutional accommodation of the conflicting interests of the parties," and, therefore, satisfied the requirements of due process. *Id.* at 607.

However, none of the saving factors in *Mitchell* are present in the case at bar. The seizure was not begun by the presenting of a non-conclusory affidavit to a judge and there were no requirements of a prompt, post-seizure hearing wherein the Appellees would possess the burden of proof. Indeed, the Virginia procedure for correction of an erroneous assessment in CODE §58-1130 places the burden of proof upon the debtor-taxpayer and not upon the creditor-tax collector. By no stretch of the imagination could a complex sales and use tax case involving a corporation with nationwide sales and distribution

be considered an uncomplicated underlying matter that could be easily determined. And finally, but most importantly, the Appellees, conceding that the case at bar is not a jeopardy situation, have no present interest in the Appellant's bank account as did the creditor under the vendor's lien in *Mitchell.* When tested by the *Mitchell* standards, the Appellees' seizure of the Appellant's working capital violated procedural due process.

The most recent chapter in creditor-debtor due process requirements was written less than two years ago in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601 (1975), when this Court overturned, as contrary to due process, a Georgia statute authorizing prejudgment garnishment in a case in which a corporation's commercial bank account had been frozen. This Court described the effect of the procedure and its reason for unconstitutionality in terms strikingly similar to the case at bar:

> "Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee. Here a sizable bank account was frozen, and the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." *Id.* at 607

Moreover, this Court was not impressed with the argument that the debtor was a corporation rather than a consumer. It recognized the irreparable harm which would be caused by freezing a corporation's bank account and noted that the type of property involved was not, nor should it be, relevant in applying the due process clause.

Thus, even under interpretations of *Sniadach, Fuentes, Mitchell* and *North Georgia Finishing,* most favorable to the Appellees, statutory prejudgment creditor remedies, absent

extraordinary circumstances, which even temporarily deprive a debtor of a significant property interest without notice and an opportunity for a prior probable-cause-type hearing are, as held in *Fuentes,* unconstitutional under the Fourteenth Amendment's due process clause unless safeguards such as those mentioned in *Mitchell* and *North Georgia Finishing* are present and even then the law may be invalid if the issues underlying the seizure are not susceptible to uncomplicated documentary proof or if the creditor does not have a present interest in the property seized.

Clearly, CODE §58-1010 and the actions of the Appellees meet none of the above standards and, on the face of it, would certainly violate procedural due process. But does the fact that the underlying creditor in the case at bar is really the State of Virginia and the underlying "debt" is a claim for back taxes excuse the violation of procedural due process? In this case, it does not.

II

A Claim by the State of Virginia for Back Taxes in a Non-Jeopardy Situation is not an Extraordinary Circumstance that Permits an Incursion Upon Traditional Principles of Due Process or Would Validate CODE §58-1010.

As shown above, if the State of Virginia be considered a normal creditor, the actions of the Appellees, permitted by CODE §58-1010, violate procedural due process. Under normal circumstances, the due process requirement of a proper hearing is applicable to governments in their quests for collection of revenue as well as being applicable in commercial settings, and such has been law for a long period of time. *Security Trust and Safety Vault Co.* v. *Lexington,* 203 U.S. 323, 333 (1906) ("Before this special assessment, the taxpayer must have an opportunity to be heard as to its validity and extent.") *See also, Central of Georgia Railway Co.* v. *Wright,* 207 U.S.

127 (1907). The requirement of a hearing in a tax matter was most clearly stated in *Londoner* v. *Denver,* 210 U.S. 373 (1908) at 385:

> "But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some state of the proceeding before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard. . ."

The Appellant, however, recognizes that there are certain situations, of course, where, because of unusual circumstances, lack of adherence to principles of due process is condoned. Thus, this Court in *Fuentes,* noting in 407 U.S. at 90-91 that "[t]here are 'extraordinary situations' that justify postponing notice and opportunity for a hearing," cited the collecting of the internal revenue of the United States, meeting needs of a national war effort, protecting against bank failures and protecting the public from misbranded drugs and contaminated foods. These situations of summary seizure are permissible because

> "in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsibile for *determining under the standard of a narrowly drawn statute, that it was necessary and justified in the particular instance.*" *Id.* at 91. (Emphasis supplied).

The Appellant admits, and doubts that anyone would seriously disagree, that there is a great, overriding public as well as governmental interest in misbranded drugs, contaminated

food, a national war effort and bank failures. But surely these far reaching and potentially dangerous events cannot be placed on a parity with the summary taking of one's property in a conceded non-jeopardy case to satisfy allegedly unpaid taxes. Perhaps a jeopardy assessment would be more analogous to the above situations; indeed, the extreme exigencies of a jeopardy situation (i.e. the secreting of assets, probability of fleeing or probability of having no assets later) have been the historical justification of the jeopardy assessment procedure. Certainly, no one's life is in danger in the present case, and by the Appellees' own concession, there are no exigencies in the case at bar warranting an action so drastic as a jeopardy assessment pursuant to CODE §58-441.32, a statute containing standards and analogous to the Federal jeopardy assessment statutes in the Internal Revenue Code. It is admitted by the Appellees that the collection of the revenue that may ultimately be due the State of Virginia by the Appellant is not in peril. Thus, there are no competing interests to balance between the State of Virginia and the taxpayer in this case. If there are, however, the balance is clearly in favor of the Appellant.

The *Fuentes* standards (407 U.S. at 91) for pre-hearing seizure require not only an important government interest demanding prompt action, which is not present in the case at bar, but, in addition, thereto, the governmental official must determine that the seizure is necessary under the standards of a narrowly drawn statute.

The history of litigation before this Court concerning sales and use taxes with respect to national corporations is too complex and even unsettled to state that the underlying tax involved in the case at bar provides the necessary predicate of a narrowly drawn statute. And the seizure statute itself, CODE §58-1010, cannot, by any stretch of the imagination, be defined as "narrow" with adequate "standards". On the contrary, broadness and vagueness seem to be its outstanding feature. Even Virginia's jeopardy assessment statute, CODE §58-

441.32, is not as broad or vague. And a jeopardy assessment (assuming, but not conceding, that it is constitutional) is surely the outer limit of a taxing authority's power to summarily exact revenues. The Appellees could not have invoked Virginia's jeopardy assessment statute in the case at bar because, as they admit, the facts of the case did not meet the standards in the statute. There was no peril to ultimate collection! Therefore, they had to rely upon CODE §58-1010, a statute with absolutely no standards.

The "special governmental and public interest" in the *Fuentes* standards refers, no doubt, to the government's interest in collecting its revenues. But why is this interest so paramount over the interest that *any* creditor has in obtaining money allegedly due him? Who is hurt more by any possible loss: the government, which concedes that the revenue collection from the Appellant is not in peril, or the businessman such as this Appellant who has stringent working capital needs? Government creditors, as noted in Clark and Landers, *Sniadach, Fuentes and Beyond: The Creditor meets the Constitution*, 59 Va. L. Rev. 335 (1973), should be put on a parity with other types of creditors and the interests of the debtor and creditor balanced. The authors concluded by stating, "... there is no compelling reason to allow tax attachment when there is no danger to the government that it will be unable to collect the ultimate tax liability... In sum, it would seem that the government must stand in line with other creditors in adhearing to due process." *Id.* at 371. This equality of priority with its attendant procedural requirements in non-jeopardy situations is all that the Appellant asks. If Virginia wishes to assure that its taxes are collected as expeditiously as possible, then it is the duty of its General Assembly to create some procedural system, similar perhaps to that of the federal government with its Tax Court, which carefully protects the constitutional rights of taxpayers while, at the same time, allowing the government to collect its taxes after a valid determination that such taxes are due.

It is interesting to note that in *Goldberg* v. *Kelley*, 397 U.S. 254 (1970), this Court held that a recipient's welfare benefits could not be unilaterally stopped by the government without an impartial hearing. Thus, if the Appellees' argument (i.e., that no prior determination of liability is necessary before collection) is accepted, then a nonsensical situation is presented. On the one hand, it is held that the government must strictly follow due process requirements in *preserving* revenues already collected, *Goldberg, supra;* on the other hand, under Appellees' theory, due process requirements may be disregarded in *obtaining* the revenues in the first place. Nor can it be advanced that CODE §58-1118, which allows an application to be made to the Commissioner for a correction of the assessment and is an administrative remedy previously undertaken by the Appellant, provides the necessary "impartial" hearing. Assessments in Virginia are made under the direction of the Commissioner and an appeal to him is merely a request that he change his mind. (It is to be noted that the underlying tax in this case is one of approximately $200,000.00 and involves a novel issue which previously has never been assessed in Virginia. It is quite doubtful that the assessment was done without the personal concurrance of the Commissioner.) This is far from the guidelines enunciated in *Goldberg, supra,* 397 U.S. at 271:

> "And, of course, an impartial decision maker is essential. . . [P]rior involvement in some aspects of a case will not necessarily bar a[n]. . . official from acting as a decision maker. He should not, however, have participated in making the determination under review."

The Appellees have argued that " '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate,' *Phillips* v. *Commissioner,* 283 U.S. 589 at 596-597 (1931)" and that Virginia's correction of erroneous assessment statute, CODE §58-1130, is adequate. However, the *Phillips* quotation

flies squarely in the face of this Court's decisions in *Sniadach, Fuentes* and *North Georgia Finishing, supra.* Indeed, those very cases involved only property rights and a postponement of the judicial inquiry.

But even if the *Phillips* dicta remain valid, what form of *ex post facto* judicial determination is adequate? Certainly not CODE §58-1130, a slow and cumbersome procedure that is couched in terms of assessment and not collection. (Parenthetically, it is to be noted that the Appellant has begun the re-assessment procedure by filing suit pursuant to CODE §58-1130 in the appropriate Court in May of 1975. No decision has been rendered. It is generally agreed that whatever its outcome may be, it will be appealed to the Supreme Court of Virginia.) While the statute may be adequate to attack an assessment, the collection damage will have already been done. It is, in effect, Virginia's statutory procedure analogous to the suit for a refund in the federal tax system. Clearly, a re-assessment hearing long after a corporation's entire working capital has been seized is not adequate. The hearing permitted by CODE §58-1130 is not "an adequate remedy at law" within the framework of procedural due process as stated by this Court.

Furthermore, it should be noted that *Phillips, supra,* involved an attack on an assessment and not collection. The government had not yet seized any property and, indeed, the taxpayer had already had his day in court in the Board of Tax Appeals (predecessor of the Tax Court) and before a United States Court of Appeals. There was no prejudgment seizure. The taxpayer did not have to pay any taxes on the assessment prior to having a redetermination before an impartial judicial hearing in the Board of Tax Appeals. As the Court pointed out, this remedy of a hearing before the Board of Tax Appeals, without previously paying the tax and without need of posting a bond, provided an adequate remedy for the taxpayer. But Virginia has no procedure comparable to the Tax Court where the taxpayer, in a non-jeopardy situation, may litigate before

paying the tax. Thus, in Virginia, this form of adequate remedy does not exist.

It can not be argued that the seizure of a corporation's entire working capital can result in anything other than irrepairable injury. The very lifeblood of the corporation, and, ultimately its wage-earners, is gone. And the mere fact that, by statutorily unauthorized grace, the corporation was permitted to post a bond does not save CODE §58-1010 or lessen irreparable injury. The onus of action cannot be placed upon the alleged debtor. *North Georgia Finishing Inc.* v. *Di-Chem, Inc., supra,* 419 U.S. 601. While this Court has stated that when conflicting interests are involved, a prompt post-seizure hearing may be adequate, *Mitchell* v. *W. T. Grant Co., supra,* 416 U.S. 600, it cannot be adequate when irrepairable harm is done:

> "Accordingly, neither the holding nor the dicta in *Phillips* supports the proposition that the tax collector may constitutionally seize the taxpayer's assets without showing some basis for the seizure under circumstances in which the seizure will injure the taxpayer in a way that cannot be adequately remedied by a Tax Court judgment in his favor. Instead it would be entirely consistent with our more recent holdings." *Commissioner* v. *Shipiro,* _____ U.S. _____ at _____ (No. 74-744), 44 U.S.L.W. 4313 at 4319 (1976).

Finally, while Virginia does not stand alone in its summary tax collection procedures, numerous other states have adopted procedures much more compatable with due process. See, for example *Vernon's Ann. Missouri Stat.,* §143.861(3) wherein that state's attorney general brings suit to collect and enforce tax liens in the same manner as any other action at law and *Michigan Stat. Ann.* §7.557(1421) which sets up that state's version of the federal Tax Court.

The situation in the case at bar involves no really competing governmental interest (this is a non-jeopardy situation wherein the Appellees have conceded that ultimate collection is

not in peril) and no pre-seizure hearing procedure (such as a system analogous to the federal Tax Court). But it does involve irreparable harm to the Appellant. It should further be noted that CODE §58-1010 has an extremely chilling effect on taxpayer litigation. It becomes an unwarranted bludgeon in the hands of the tax collector in non-jeopardy situations. Even though CODE §58-1130 allows two years after assessment within which to bring suit to correct an erroneous assessment, CODE §58-1010 allows seizure of assets 30 days after the assessment. The effect of CODE §58-1010 allows the Commissioner to state in a disputed, non-jeopardy tax controversy: "You want to litigate? Fine, you are entitled to your day in court. But before you obtain it, we will seize all of your assets under CODE §58-1010." This Hobson's choice has the practical effect of forcing the taxpayer to "negotiate away" a substantial portion of his legitimate tax dispute.

Accordingly, CODE §58-1010 is violative of procedural due process and should be declared to be unconstitutional. The Appellees should not be permitted to seize assets in satisfaction of allegedly due, but contested, taxes without benefit of judicial process in a situation wherein ultimate collection of the taxes is conceded to be assured. Otherwise, the Appellant, and all other taxpayers in Virginia and those in states with statutes similar to Virginia's, are left remediless and at the mercy of the tax collector in non-jeopardy situations where there is a legitimate dispute concerning the assessed tax.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the question presented is substantial and of great public importance, not only to this Appellant but to all taxpayers within Virginia and within other states with summary tax collection procedures similar to those involved in Virginia. It is submitted that this Court should note probable jurisdiction and set the matter for argument.

Respectfully submitted,
THE STUART MCGUIRE
COMPANY, INC.

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APPENDIX

APPENDIX

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PORTIONS OF OPINION LETTER

Relevant Portions of Opinion Letter of the
Circuit Court of the City of Richmond

(Portions of the opinion, including footnotes, concerned solely with the "state law" question have been omitted.)

CIRCUIT COURT OF THE CITY OF RICHMOND

July 24, 1975

CHARLES K. TRIBLE, ESQ.
Assistant Attorney General
Post Office Box 6-L
Richmond, VA 23282

JOHN G. ROCOVICH, JR., ESQ.
Martin, Hopkins and Lemon
Sixth Floor, Boxley Building
Roanoke, VA 24005

Gentlemen:

Re: Case No. D-8359-S
THE STUART MCGUIRE COMPANY, INC.
v. WILLIAM H. FORST, etc. *et al.*

As the result of a State conducted audit of plaintiff's business, a $197,287.50 sales and use tax was assessed by the Commonwealth (defendant) against plaintiff, liability therefor being denied by plaintiff. Upon plaintiff's refusal to pay the tax, defendant placed a lien therefor against plaintiff's account in two banks thereby freezing all of plaintiff's deposits in such banks. In order to release its funds thus frozen, plaintiff, with the consent of defendant, executed bond in the sum of $250,000.00 conditioned upon payment of the tax if found to have been properly assessed. Acquiescence in the substitution of the bond for the tax lien appears to have been a voluntary

act upon the part of plaintiff, as there is no statutory procedure providing therefor.

Plaintiff institutes this suit seeking a mandatory-injunction against defendants, allowing the cancellation of the bond and enjoining defendants from attempting collection of the assessment until such time as the liability of plaintiff for the assessed taxes can be determined by proper judicial authority. . . .

The matter comes on to be heard upon defendants' demurrer based upon §58-1158 of the Code of Virginia, 1950, as amended, which section defendants contend precludes the maintenance of a suit for the purpose of restraining the collection of any tax except in cases where the taxpayer against whom the assessment has been imposed has no adequate remedy at law.

Plaintiff seeks to have the demurrer overruled upon the grounds . . . ; and (c) that the collection of an assessment prior to the determination of liability pursuant to § 58-1130 constitutes a violation of the taxpayers rights to procedural due process of law under the United States Constitution.

Opinion

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Nor is plaintiff's position as stated in (a), *supra*, any more tenable, for while it is true that there is no specific statute or tenet of the common law that permits the collection of assessed taxes without prior adjudication of liability, there is, conversely, no prohibitive statute or common law tenet against such collection and respectable case law extends to a taxing authority such right.[1]

---

[1] *See Phillips* v. *Commissioner of Internal Revenue*, 283 U.S. 589; 75 L. ed. 1289, 1297, to be later commented upon.

Sole Issue Considered

The single issue before the Court is whether plaintiff has an adequate remedy at law which it can pursue seeking relief from the situation in which it has been placed by the lien placed upon its two bank accounts. If so, defendants' demurrer must, of necessity, be sustained by virtue of CODE §58-1158. This statute has been upheld in this state by a long line of authority.

Defendants contend that CODE §58-1130 provides the adequate remedy required by §58-1158. Plaintiff, on the contrary, argues that §58-1130 does not afford plaintiff an adequate remedy for two reasons; *i.e.* . . . and (2) that plaintiff's constitutional rights have been violated by attaching its property without its having had a prior determination as to liability in a hearing in an impartial forum.

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As to Plaintiff's second position, it argues that collection prior to any determination of liability is unconstitutional and, therefore, this method of collection applied by plaintiff was unconstitutional and void.

In urging this position, plaintiff relies upon a number of late cases from the U.S. Supreme Court holding that a determination of liability prior to collection of a debt by garnishment proceedings is a *sive qua non* to meeting the test of constitutionality. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337; *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L. ed. *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. ed(2d) 559, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, U.S. , 42 L. ed. 2d 751.

None of these cases, however, involve attempted collection of taxes by a tax authority and for this reason are not apposite. *Fuentes* and *Di-Chem* principally relied on by plaintiff, each struck down state statutes involving prejudgment creditor remedies in *commercial* cases.

Phillips v. *Commissioner of Internal Revenue*, 283 U.S. 589, 75 L. ed. 1289, on the contrary is precisely in point. In this case the constitutionality of § 280(a)(1) of the Revenue Act of 1926 was challenged upon the ground that the forced collection of unpaid income and property taxes prior to a determination of liability offended against the due process clause of the Fifth Amendment and against the Seventh Amendment. Justice Brandeis, speaking for the unanimous Court in rejecting this argument and speaking to the statute in question,[5] said:

> . . . The proceeding is one to collect the revenue. That Congress deemed the section necessary in order to make the tax-collecting system more effective, is established not only by the fact of enactment but also by the reports of the committees.
>
> The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.
>
> At 1295, 1296.

Then, in commenting upon a similar holding in *Den ex dem. Murray* v. *Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372, Justice Brandeis continues:

> . . . It is urged that the decision in the Murray case was based upon the peculiar relationship of a collector of revenue to his government. *The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues.*
>
> Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate . . . (Emphasis added.)
>
> At 1297.

[5] Sec. 280(a)(1) of the U.S. Tax Code.

It will be noted that *Phillips* did not involve a jeopardy situation but only a routine tax collection operation. Nor was the ruling confined to any "extraordinary situation" as is suggested by plaintiff, but was, in fact, nothing more than a reaffirmation of the age old principle thus enunciated in *Bull* v. *United States*, 295 U.S. 247:

> Once the tax is assessed, the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the Government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. *But taxes are the lifeblood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.* (Emphasis added.)

Plaintiff, in attempting to distinguish *Phillips* from the case at bar (plaintiff's brief, 15 and 16), suggests that the statute under review is *Phillips* concerned the *assessment* method employed rather than the *collection* method. On the contrary, *Phillips*, in speaking of the proceeding before the Court, specifically states (75 L ed. 1289 at 1295):

> . . . The proceeding is one to collect the revenue . . .

In *Fuentes* the Court, in citing *Phillips* as authority for its statement that "the Court (U.S. Supreme Court) has allowed summary seizure of property to collect the internal revenue of the United States," says (footnote 24) that the Court in *Phillips* relied upon *"the need of the government promptly to secure its revenues."*

Upon facts identical to those in the case at bar, by per curiam opinion, the Ninth Circuit Court of Appeals in the case of *Tavares* v. *United States*, 491 F. 2d 725 (1974) held that the doctrine enunciated in *Sniadach* and *Fuentes* was not applicable to Internal Revenue action in levying upon a taxpayer's bank account without prior hearing on the question of liability, holding that *Phillips* was conclusive on the point. The only distinction between *Phillips* and *Tavares* on the one hand, and the case at bar on the other, is that in the former two cases the federal taxing authority was involved and in the latter, the state. No reason can be perceived why the rule of *Phillips* and *Tavares* should not apply in both instances.

Nor can this court find anything in Justice Powell's separate opinion in *North Georgia Finishing* v. *Di-Chem, Inc., supra,* to support plaintiff's argument. On the contrary, he states:

> Pregarnishment notice and a prior hearing have not been constitutionally mandated in the past. Despite the ambiguity engendered by the Court's reliance on *Fuentes,* I do not interpret its opinion today as imposing these requirements for the future.

He further indicates his view to be that a prompt *post-garnishment* judicial hearing will, with proper safeguards, suffice.

Conclusion

For the above reasons, it is held that Virginia Code § 58-1130 provides an adequate remedy at law in contemplation of the language of § 58-1158, that plaintiff would not, therefore, be entitled to injunctive relief and that defendants' demurrer must be sustained.

Counsel for defendants may present sketch for order to this effect, preserving plaintiff's objections to the Court's ruling.

Yours very truly,

/s/ Alex H. Sands, Jr.

Alex H. Sands, Jr.

sac

ORDER OF THE CIRCUIT COURT OF THE CITY OF RICHMOND

Final Order

This cause came on to be heard upon the plaintiff's amended bill for injuction, the demurrer of the defendants, the memoranda filed on behalf of the parties, and was argued by counsel.

Whereupon, for the reasons more fully set forth in the Court's opinion letter dated July 24, 1975, which is incorporated herein by reference, the Court is of the opinion that the sales and use tax collection procedure provided by §58-441.35 is not exclusive and the Department's election to proceed under §58-1010 was proper; that the collection of a tax assessment by the Virginia Department of Taxation prior to a judicial determination of the validity of the assessment pursuant to §58-1130 is not prohibited by law and does not violate the taxpayer's rights to procedural due process of law under the United States Constitution; and that the plaintiff has an adequate remedy at law and is barred by § 58-1158 from obtaining injunctive relief against the collection of the tax.

Now, therefore, it is ADJUDGED, ORDERED AND DECREED that the demurrer of the defendants is sustained.

The Clerk is directed to send an attested copy of this Order to the State Tax Commissioner and file the papers among the ended causes.

A Copy,

Teste: EDWARD G. KIDD, Clerk

By: /s/ JESSIE M. HADDON

Deputy Clerk

PORTION OF NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS TO SUPREME COURT OF VIRGINIA

Notice of Appeal

The Plaintiff, The Stuart McGuire Company, Inc., hereby gives notice that it will appeal from the final order entered by the Circuit Court of the City of Richmond, Division I, on the 27th day of August, 1975, in this cause. There is no transcript or statement of facts, testimony or other incidents of the case to be hereafter filed.

Assignment of Error

The Plaintiff, by counsel, hereby assigns the following error:

The Court erred in substaining the demurrer of the Defendant to the Plaintiff's Bill of Complaint, and therein ruling . . . that the collection of a tax assessment prior to a judicial determination of the validity of the assessment pursuant to §58-1130, Code of Virginia, is not prohibited by law and does not violate the Plaintiff's rights to procedural due process of law under the United States Constitution; and that the Plaintiff has an adequate remedy at law and is barred by §58-1158, Code of Virginia, from obtaining injunctive relief against the collection of the tax.

THE STUART MCGUIRE
COMPANY, INC.

By: /s/CHARLES F. BARNETT, JR.
Of Counsel

OPINION OF SUPREME COURT OF VIRGINIA

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 16th day of March, 1976.

The petition of Stuart McGuire Company, Inc., for an appeal from a decree entered by the Circuit Court of the City of Richmond, Division I, on the 27th day of August, 1975, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and William H. Forst, State Tax Commissioner, Virginia Department of Taxation, and others were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that there is no reversible error in the decree appealed from, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

A Copy,

Teste:

HOWARD G. TURNER, Clerk

By: /s/ ALLEN L. LUCY
Deputy Clerk

Record No. 751421

NOTICE OF APPEAL
IN THE SUPREME COURT OF VIRGINIA

THE STUART MCGUIRE COMPANY, INC.,

Appellant,

vs. NO. 751421

WILLIAM H. FORST, State Tax Commissioner,

FRANK W. LEWIS, Director, Sales and Use Tax Division,

and

VIRGINIA DEPARTMENT OF TAXATION

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Stuart McGuire Company, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgement of the Supreme Court of Virginia entered in this action on March 16, 1976, affirming the decree of the Circuit Court for the City of Richmond, which decree sustained the demurrer of the appellees above named and dismissed the appellant's bill for injunction.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

THE STUART MCGUIRE COMPANY, Inc.

By: /s/ CHARLES F. BARNETT, JR.

CHARLES F. BARNETT, JR.
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(703) 342-3185

and

/s/ JOHN G. ROCOVICH, JR.

JOHN G. ROCOVICH, JR.
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Attorneys for Appellant

Proof of Service

I, Charles F. Barnett, Jr., one of the attorneys for The Stuart McGuire Company, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States hereby certify that, on the *11th* day of May, 1976, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On William H. Forst, State Tax Commissioner, Frank W. Lewis, Director, Sales and Use Tax Division, and the Virginia Department of Taxation, by mailing a copy, in a duly addressed envelope, with proper postage pre-paid, to Andrew P. Miller, Esquire, Attorney General of the State of Virginia and J. Durwood Felton, III, Esquire, Assistant Attorney General of the State of Virginia, at their offices at 1101 East Broad Street, Richmond, Virginia 23219, Counsel of Record for the Appellees.

/s/ CHARLES F. BARNETT, JR.
Charles F. Barnett, Jr.

STATEMENT FROM DEFENDANTS' (APPELLEES') BRIEF IN SUPPORT OF DEMURRER

"Further, there is no indication that the Commissioner thought that the collection of the tax would be jeopardized by delay or that there was any reason to close the taxable period of the taxpayer and immediately proceed by way of a jeopardy assessment." Brief in Support of Demurrer, at page 7-8.

VIRGINIA STATUTES INVOLVED

The following are the Statutes of the Commonwealth of Virginia involved in this Jurisdictional Statement. All statutes are in Title 58 of the Code of Virginia, 1950, as amended (1974 Repl. Vol 8A) at the page indicated:

> **§58-441.32.** Jeopardy assessment. — If the Commissioner is of the opinion that the collection of any tax or any amount of tax, required to be collected and paid under this chapter, will be jeopardized by delay, he shall make an assessment of the tax or amount of tax required to be collected and shall mail or issue a notice of such assessment to the taxpayer together with a demand for immediate payment of the tax or of the deficiency in tax declared to be in jeopardy including penalties. In the case of a tax for a current period, the Commissioner may declare the taxable period of the taxpayer immediately terminated and shall cause notice of such finding and declaration to be mailed or issued to the taxpayer together with a demand for immediate payment of the tax based on the period declared terminated and such tax shall be immediately due and payable, whether or not the time otherwise allowed by law for filing a return and paying the tax has expired. Assessments provided for in this section shall become immediately due and payable, and if any such tax, penalty or interest is not paid upon demand of the Commissioner, he shall proceed to collect the same by legal process, or in his discretion, he may require the taxpayer to file such bond as in his judgment may be sufficient to protect the interest of the State. Page 202.

> **§58-1010.** Collection out of estate in hands of or debts due by third party. — Any person indebted to or having in his hands estate of a person assessed with taxes or levies may be applied to in writing by the officer for payment thereof out of such debt or estate and a payment by such person of such taxes or levies, either in whole or in part, shall entitle him to a charge or credit for so much on

account of such debt or estate against the party so assessed. From the time of the service by such officer of any such application, the taxes and levies shall constitute a lien on the debt so due from such person or on the estate in his hands. If the person applied to does not pay so much as may seem to the officer ought to be recovered on account of the debt or estate in his hands, the officer shall, if the sum due for such taxes or levies does not exceed two thousand dollars, exclusive of penalties and interests, procure from a justice of the peace or judge or clerk of a court not of record a summons directing such person to appear before the appropriate county court or municipal court, at such time and place as may seem reasonable; and if the sum due exceeds two thousand dollars, shall procure from the clerk of the circuit court of the county or corporation court of the city a summons directing such person to appear before such court on the first day of the next term thereof; provided that in all cases returnable before a county court or municipal court, any person so summoned shall have a right, if the sum due for such taxes or levies exceeds the sum of three hundred dollars, exclusive of penalties and interest, to remove the case to a court having jurisdiction of appeals from such county court or municipal court wherein the case was brought, and the procedure from and upon such removal shall be the same, mutatis mutandis, as is provided by §16.1-92. Page 440.

§58-1118. Application to Commissioner for correction. —Any person, firm or corporation assessed with any taxes administered by the Department of Taxation may, within ninety days from the date such assessment was mailed to the taxpayer at his last known address, apply for relief to the State Tax Commissioner. Such application shall fully set forth the grounds upon which the taxpayer relies and all facts relevant to the taxpayer's contention. The Commissioner may also require such additional information, testimony or documentary evidence as he deems necessary to a fair determination of the application. Page 451.

§58-1119. Action of Commissioner on application for correction. — If the Commissioner be satisfied, by evidence submitted to him or otherwise, that an applicant is erroneously assessed with any such taxes, the Commissioner may order that such assessment be corrected. If the assessment exceeds the proper amount, the Commissioner shall order that the applicant be exonerated from the payment of so much as is erroneously charged, if not already paid into the State treasury, and, if paid, that it be refunded to him. If the assessment be less than the proper amount, the Commissioner shall order that the applicant pay the proper taxes. Page 451.

§58-1130. Application to court for correction of erroneous assessments of State taxes generally. — Any taxpayer, assessed with any tax administered by the Department of Taxation, aggrieved by any such assessment may, unless otherwise specifically provided by law, within two years from the thirty-first day of December of the year in which such assessment is made, apply for relief to the court in which the officer who made the assessment gave bond and qualified or to which or to whose clerk such bond and the certificate of his qualification was returned, or to the circuit court of the county or any court of record of the city in which such person resides, or in the case of a partnership or domestic corporation, the county or city in which it has its principal office in this State, or in the case of a foreign corporation the county or city in which is located the office in this State at which claims against the foreign corporation may be audited, settled and paid.

If the assessment complained of was made by the Department of Taxation, a copy of the application shall be served on the State Tax Commissioner at least twenty-one days before the hearing. Pages 454-455.

§58-1158. No injunctions against assessment or collection of taxes. — No suit for the purpose of restraining the assessment or collection of any tax, State or local, shall be maintained in any court of this Commonwealth, except when the party has no adequate remedy at law. Pages 467-468.